UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

SUPERSHUTTLE INTERNATIONAL DENVER,

Employer,

and Case **27-RC-8582**

COMMUNICATIONS WORKERS OF AMERICA,

Petitioner

COMMUNICATIONS WORKERS OF AMERICA'S BRIEF ON REVIEW

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Pursuant to Section 102.67(g) of the Board's Rules and Regulations, the Communications Workers of America ("CWA" or "Union") files this brief in support of its petition and to overturn that portion of Region 27 Regional Director Michael Josserand's February 26, 2010 Decision and Order in the above-named case to the extent he ruled that the Union has a "disabling conflict of interest."

I. INTRODUCTION

Petitioner CWA seeks to organize the shuttle van drivers employed by SuperShuttle International Denver, Inc. ("SuperShuttle" or "Employer") in Denver, Colorado. The Employer seeks to thwart the employees' choice of representative, claiming that there is a "disabling conflict of interest" caused by the Union's relationship with the driver-owners of Union Taxi Cooperative ("UTC" or "Cooperative"). The Regional Director sided with the Employer on the "disabling conflict of interest" issue and ruled that the drivers could not be represented by CWA. Thus, an understanding of the issues herein must begin with a review of CWA's representation of taxicab drivers.

In 2008, 262 taxicab drivers in Denver, Colorado banded together to form a non-profit cooperative which they named Union Taxi Cooperative. In reality, UTC is nothing more than a device to help independent contractor-taxicab drivers sell their labor at fair rates. Prior to forming the Cooperative, these independent contractors partnered with an affiliate of the Union – CWA Local 7777 – in their efforts to organize. Neither of these occurrences is unprecedented or improper. Unions have frequently, throughout history, found themselves in the position of helping workers to sell their labor as independent contractors.

Upon forming UTC, the drivers maintained their relationship with CWA. Under its bylaws, all UTC drivers are required to be members although UTC's board of directors is permitted to waive the requirement. Significantly, the drivers put the union membership requirement on themselves. The Union does not – and cannot – require UTC drivers to belong to CWA.

Now CWA seeks to organize drivers of a different sort in Denver, the shuttle van drivers employed by SuperShuttle. The Union's continued relationship with the 262 driver-owners of UTC would have no adverse effect on the Union's representation of SuperShuttle's drivers. There is no direct competition between UTC and SuperShuttle because they offer significantly different services (private rides versus shared rides) and far different cost structures (per mile fare versus flat fee). But even if UTC did compete with the Employer, this is nothing new. Unions, including CWA, have traditionally organized and represented various employers in the same industry. In this case, nothing in the Union's representation of the 262 UTC drivers, or even with the fact that one of the Local Union's organizers is also one of nine members of UTC's board of directors would prevent the Union from providing anything but zealous representation to SuperShuttle's drivers.

Significantly, the Union has no distinct financial interest in UTC. Certainly its financial interest is no greater than its financial interest in any unionized employer. The Union has no financial incentive for SuperShuttle to fail. If SuperShuttle fails than the Union (if successful in its organizing effort) would lose members. And such failure would not benefit the Union in its relationship with the drivers at UTC. Regardless of

whether the drivers at UTC prosper, the Union will continue to receive the same dues for the same 262 members who work for the Cooperative.

For these reasons, the Regional Director's finding of a "disabling conflict of interest" should be reversed, the petition should be granted and an election should be directed to allow the drivers to vote for or against CWA as its exclusive representative.

II. PROCEDURAL HISTORY

On December 11, 2009, the Union filed a "petition seeking to represent the shuttle van drivers employed by SuperShuttle International Denver, Inc." (RD D&O p. 1)[1]. The Employer raised two issues in an attempt to get the petition dismissed, arguing that: (1) the shuttle van drivers were independent contractors, not employees, and (2) the Union's representation of taxicab drivers who own and operate a cooperative taxicab firm created a disabling conflict of interest that should cause the Union to be disqualified as a representative of the Employer's shuttle van drivers.[2] A hearing on the Employer's two issues was held on December 28, 2009, and January 7, 8 and 12, 2010. (RD D&O p. 2).

On February 26, 2010 the Regional Director issued his Decision and Order. He ruled that the shuttle van drivers were employees and not independent contractors under the Act. (RD D&O pp. 28-38). However, he found that based on the "form of assistance provided by the Union to UTC in exchange for monthly financial remuneration is in direct conflict with the single-minded representational purpose required of a bargaining representative, since the Union's advocacy on behalf of UTC could have direct, adverse

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[1] Citations in the Brief shall be made as follows: Citations to the Regional Director's Decision and Order as RD D&O [page no.]; citations to the Transcript as "T. [page no.]"; citations to the Subpoena Transcript as "Subpoena T. [page no]"; and citations to Respondent Exhibits as "R. Ex. [exhibit no.]".

[2] In its brief to the Regional Director, the Employer also raised the question of whether the shuttle van drivers were supervisors. The Regional Director found that the Employer did not raise and the parties did not litigate the supervisory issue at the hearing. (RD D&O p. 2).

effects on the SuperShuttle Denver bargaining unit." (RD D&O p. 47). This, according to the Regional Director, caused the Union to have a "disabling conflict of interest" and thus the Union's representation petition was dismissed. (RD D&O p. 2).

The Union requested review of the Regional Director's decision that the Union has a "disabling conflict of interest" and on May 5, 2010,[3] the Board granted the Union's request for review.[4]

III. FACTS RELEVANT TO THE ALLEGED DISABLING CONFLICT

The Employer operates a shuttle van service whose primary function is to transport individuals to or from the airport to hotels or residences. (RD D&O p. 7). To operate at the airport the Employer receives a certificate from the Colorado Public Utilities Commission ("CPUC") that describes the boundaries of the Employer's operational area, hours of service and the maximum flat fare (called a "tariff") that the Employer can charge for this shuttle service. (RD D&O p. 7). As stated above, the Union has filed a petition to represent the drivers of these shuttle vans. (RD D&O p. 1). At the time that it filed this petition and continuing to the present, the Union has represented taxicab drivers who own, operate and drive taxicabs for Union Taxi Cooperative. (RD D&O p. 26).

CWA Local 7777 ("Local 7777") is a local union in Denver, Colorado. It has approximately 3,000 members. (T. 99). The vast majority of its members work in the telecommunications industry, including 1,900 members at Qwest Communications and others at Avaya, AT&T and Dex. (T. 84, 108, 121; R. Ex. 8 (list of bargaining units on

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[3] The Board's Order was dated May 5, 2010, but was not faxed to the Union until the following day, May 6, 2010.

[4] The Employer filed a Request for Review challenging the Regional Director's finding that the drivers were employees, not independent contractors, under the Act. The Board denied the Employer's request for review.

website)). Other Local 7777 bargaining units include Denver Public Schools, One World Arts Printing and "CWA Taxi Drivers". (*See* R. Ex. 8; Tr. 121). Local 7777 represents drivers who work for various taxicab companies, including Union Taxi Cooperative. (T. 104, 107).

On July 2, 2007, Local 7777 reached an affiliation agreement with an organization called The Professional Taxicab Operators of Colorado Association, which was commonly known as Pro-Taxi. (R. Ex. 7; T. 86). Under the affiliation agreement, Pro-Taxi members were given "full rights of CWA membership, including the right to attend and participate fully in general membership meetings, join and participate in all CWA Local Committees, run for Local Offices, have access to the Union Benefits program of CWA and the AFL/CIO, etc." (R. Ex. 7, ¶5). Pro-Taxi successfully lobbied the state legislature and, ultimately, 262 drivers of Pro-Taxi were able to create the cooperative UTC. (*See* R. Ex. 31 at 000055).

UTC is a non-profit cooperative, comprised of 262 drivers, each of whom drives a taxicab. (T. 14, 72, 73, 75, 76; R. Ex. 3 §1.1; RD D&O p. 24). The 262 drivers are owners of the Cooperative and provide services to it as independent contractors. (T. 30-31; R. Ex. 3 at p. A-1). UTC is owned "entirely by the members of the cooperative" and each "member-owner shall be entitled to one vote and only one vote...." (R. Ex. 3 at A-1). The driver-owners of UTC pay a flat fee amount to UTC each month. (T. 32-33, 54). They do not pay a percentage of how much they earn in cab fares. (T. 33).

Like shuttle van and other transportation services, these taxicab services are subject to regulation under the CPUC. (RD D&O p. 6; R. Exs. 15, 16). Pursuant to CPUC regulations, UTC operates the taxicab service under a different certificate than

shuttle vans, as these certificates are provided to taxicab services and the fare structure is based on mileage, rather than flat fares. (RD D&O p. 8).

UTC, in its membership agreement, requires all taxicab drivers to be members of the Union. (R. Ex. 2, ¶5). However, the union membership requirement can be waived by UTC's Board. (R. Ex. 2, ¶9(c)). Further, Local 7777 President Bolton testified that if UTC wanted to change the membership requirement, CWA could not stop or prevent it. (T. 128).

The Union, through Local 7777, does not have a collective bargaining relationship with UTC and does not process grievances on behalf of taxicab drivers against UTC. (RD D&O p. 25; T. 114-15). It does, however, provide other representational services for the taxicab drivers including: lobbying for legislation favorable to the drivers; meeting with parking enforcement officials when they believe that they are being singled out for ticketing; meeting with government officials regarding the cab drivers' licenses; meeting with airport officials concerning the cab driver's working conditions; accompanying cab drivers to court to assist them in trespass tickets; and protest activities where the drivers are denied the ability to use a certain facility. (RD D&O p. 26, 44; T. 105, 106-07, 114, 115, 116). Also, the Union promotes the use of union taxicab drivers similarly to how it promotes use of products such as cell phones from AT&T Mobility and telephone service from Qwest Communications. (T. 112). Local 7777 has also partnered legislatively with UTC much in the same way it has done so with AT&T, Qwest, Dex and Avaya. (T. 121-22, 123).

Each taxicab driver pays monthly membership dues of $28.00 to the Union. (RD D&O p. 25; *See* R. Ex. 31 at 000016 -20; T. 73-74).[5] UTC collects these dues from the drivers and then sends the total over to the Union on a monthly basis. (T. 38, 39, 73-74; R. Ex. 4; R. Ex. 31 at 000016-20).[6] These dues are intermingled with other Union-received dues. (RD D&O p. 26; T. 85).

The Union does not have any financial stake in UTC. (T. 123). The Union does not pay any money to UTC and does not receive any income from the Cooperative. (T. 123-24). UTC leases office space from Local 7777 and pays monthly rent in an amount of $1,000.00 to do so. (RD D&O p. 25; R. Ex. 1; R. Ex. 5; T. 20-21, 26, 95). This monthly amount includes payment of utilities and parking but not telephone. (T. 93, 95, 96). Local 7777 set the monthly rent, with utilities, after investigating the issue and determining that this was market value for leasing the space. (T. 83, 100, 118-19).

No driver-owner of UTC has ever held any office with or been employed by the Petitioner-Union. Of the 262 UTC driver-owners, none are officers of Local 7777 and only one, Abdi Buni, is employed by the Local. Buni, who is one of nine members on the UTC board of directors, is also an organizer for Local 7777 where he organizes drivers and others at the airport. (T. 58, 60, 61, 85, 98, 108-09). As an organizer, Buni is not assigned to represent the UTC drivers on their issues and does not participate in leadership meetings of Local 7777. (T. 97-98, 119-120). Should the Union prevail in this organizing drive, the Petitioner-Union, and not Local 7777, would negotiate the contract and assign the negotiators. (T. 124).

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[5] The membership and dues check off card was put into evidence, although no evidence was presented on whether any of the drivers signed it. (R. 31 at 000002).

[6] As found by the Regional Director, the drivers do not pay an initiation fee. (RD D&O p. 26; T. 97). However, this fact is not significant since there is no evidence that any Union member is required to pay initiation fees.

IV. THE REGIONAL DIRECTOR'S DECISION ON DISABLING CONFLICT OF INTEREST

Initially, the Regional Director found that "SuperShuttle and UTC are, in fact competitors." (RD D&O p. 43). He based this conclusion on his factual finding that the Employer and UTC "compete for a finite number of licenses issued for passenger transportation in their overlapping Denver metropolitan territories." (RD D&O p. 43). As further evidence that the Employer and UTC were in competition, the Regional Director cited the situation when UTC "recently sought CWA's assistance in a dispute between UTC and SuperShuttle Denver at the downtown Hyatt Regency convention center hotel." (RD D&O p. 43).

Having found that UTC and the Employer were competitors, the Regional Director examined the relationship between UTC and the Union. Initially he found that the "facts do not establish that CWA has an actual ownership interest in UTC, similar to that present in *Baush & Lomb* [108 NLRB 1555 (1954)]; or that CWA's interests are analogous to the nurse registry operated by the union in *St. John's Hospital* [264 NLRB 990 (1982)]." (RD D&O p. 43). Nonetheless, he found that the Union had a "disabling conflict of interest" because of the "inherent likelihood that CWA's bargaining efforts on behalf of SuperShuttle Denver employees would be influenced by interests outside its representative capacity based on its relationship with UTC." (RD D&O p. 43).

Though he found that the UTC relationship with the Union "is not easily defined within the framework of the above-cited Board cases" he found that the Union's "involvement with UTC is most closely analogous to IAM's involvement with MAS in *Alanis, supra.*" (RD D&O p. 44). He then acknowledged that in *Alanis*, the Board never

reached the issue of whether "IAM's involvement with MAS" caused a disabling conflict of interest. (RD D&O p. 44).

The Regional Director distinguished this case from those cases where "a union receives dues from members it represents in multiple bargaining units for employers competing in the same industry" solely because the Union and UTC did not have a "traditional" collective bargaining relationship. (RD D&O p. 45). In those cases, the dues were "primarily for representational activities involving the bargaining unit members' relationship with their employer, not primarily for legal and lobbying matters with governmental entities, in a situation where no collective-bargaining relationship even exists." (RD D&O p. 45).

But the "factor [the Regional Director found] most critical in the analysis of a disabling conflict of interest" was the "financial interest CWA has in the success of UTC by virtue of the per capital monthly fee it pays to the Union." (RD D&O p. 45). He noted that these "monies are not used by CWA to defray the costs of traditional collective bargaining" but rather these monies go into the Union's general fund as payment for services to UTC that are unrelated to any obligation under the Act to represent the UTC drivers in their relationship with UTC." (RD D&O p. 46).

He determined that "while the Union does not have a direct financial ownership stake in UTC, it still gains financially when UTC prospers, which is precisely the kind of conflict the Board warned of in *Bausch & Lomb* and *St. John's Hospital and Health Center.*" (RD D&O p. 46). Thus he concluded that "everything the Union does to assist UTC in return for monthly fees it receives could have a significant impact on the Union's representational capacity for the SuperShuttle Denver employees." According to the

Regional Director this is because the "nature of the industry in which UTC and SuperShuttle Denver compete is such that intervention on behalf of one entity can result in loss of business for another entity" such as "one company gaining vehicle certificates, while the other entity loses them." (RD D&O p. 46).

On this basis the Regional Director held that the "form of assistance provided by the Union to UTC in exchange for monthly financial remuneration is in direct conflict with the single-minded representational purpose required of a bargaining representative, since the Union's advocacy on behalf of UTC could have direct, adverse effects on the SuperShuttle Denver bargaining unit." (RD D&O p. 47).

Having found that the Union had a "disabling conflict of interest" the Regional Director dismissed the petition.

V. ARGUMENT AND AUTHORITIES

The Regional Director's decision that CWA has a disabling conflict of interest should be reversed. The law regarding the alleged conflict simply does not support the decision. Moreover, the evidence shows that UTC and SuperShuttle are not truly competitors, that the Petitioner-Union does not have any ownership or financial stake in UTC that might lead to a conflict, and that its representation of taxicab drivers in ways other than traditional collective bargaining would not prevent it from zealously representing shuttle drivers.

A. General Law on "Disabling Conflict Of Interest."

In the first and seminal case discussing a "disabling conflict of interest," *Bausch & Lomb Optical Co.*, 108 NLRB 1555, 1559 (1954), the Board found that the certified union had a disabling conflict of interest where the "[u]nion actually controls and

operates the company's business [that] is in direct competition with the Respondent." The Board based this decision on the potential effect during bargaining for a contract.

> We believe that the Union by becoming the Respondent's business rival has created a situation which would drastically change the climate at the bargaining table from one where there would be reasoned discussion in a background of balanced bargaining relations upon which good-faith bargaining must rest to one in which, at best, intensified mistrust of the Union's motives would be engendered.

Id. at 1561.

Since *Bausch & Lomb,* the Board cases concerning a "disabling conflict of interest" have broken into two categories:

(1) Cases like *Bausch & Lomb* where the Union itself owned and operated a business that competed with or provided services to the respondent employer. For example, in *St. Johns Hospital and Health Center,* 264 NLRB 990, 992-93 (1982), the Board found that "a union may be disqualified from representing an employer's employees when an enterprise controlled and dominated by the union engages in business with employer as well as when union engages in direct competition with employer." In that case the union sought to organize workers at a hospital while operating a nurse registry that provided nurses to that hospital;

(2) Cases where the potential conflict of interest is that of an agent of the Union who is involved in collective bargaining. *See Harlem River Consumers Cooperative, Inc.,* 191 NLRB 314, 317, 319 (1971) (two union agents who have financial stake in competitor and were not involved in collective bargaining did not cause conflict of interest but a third union agent who had jurisdiction to collectively bargain for respondent's employees had disabling conflict where "his business provides goods to respondent employer and competitors [and thus] he may be tempted to make demands in

bargaining that further those interests;" *Pony Express Courier Corp.*, 297 NLRB 171 (1989) (union founder and business agent may make bargaining demands or be willing to grant concessions that would subordinate employees' interests to those of his personal consulting business.); *Beverly Enterprises – North Dakota, Inc. d/b/a Garrison Nursing Home*, 293 NLRB 122, 123-24 (1989) (financial relationship between Union's Executive Director, who holds large promissory note with respondent employer, is "fraught with the possibility that negotiations between them concerning the payment of the note, including the terms of the offset might affect the collective bargaining relationship process.")

"The crucial focus of analysis in these cases is bargaining representatives' ability to pervert the collective-bargaining process, by operating through that process to directly promote interests ulterior to those of fairly and single-mindedly representing employees with whom those bargaining representatives are bargaining." *Western Great Lakes Pilots Ass'n,* 341 NLRB 272, 282 (2004). Moreover,

> [T]he Board and Courts have exercised great care whenever confronted with claims of conflict of interest on the part of bargaining representatives. They impose 'a considerable burden on a non-consenting employer ... to come forward with a showing that danger of a conflict of interest interfering with the collective bargaining process is clear and present. Hypothesis and speculation are not a sufficient foundation on which to erect a barrier against bargaining.

Id. at 282 (quotations and citations omitted). *See also Alanis Airport Services*, 316 NLRB 1233, 1233 (1995) ("In order to find that a union has a disabling conflict of interest the Board requires a showing of a 'clear and present' danger interfering with the bargaining process. The burden on the party seeking to prove this conflict of interest is a heavy one."). Here, the Regional Director erred in finding that the Employer met its "considerable [and heavy] burden." *Western Great Lakes Pilots*, 341 NLRB at 282.

B. The Union Does Not Have a Disabling Conflict of Interest.

1. UTC and the Employer are Not Competitors.

As *Bausch and Lomb* and its progeny make clear, to prove a "disabling conflict of interest" requires finding that the business with which the Union allegedly has an interest directly competes with the business which the Union is trying to organize. Here, the Regional Director wrongly concluded that UTC and the Employer were direct competitors. This conclusion is false under the Colorado Public Utility Commission's regulations and the practical realities of the differences between exclusive ride, pay-per-mile taxicab service and shared-ride, set fee shuttle service. Moreover, the non-profit cooperative model of UTC sets it apart from the Employer's for-profit structure and further establishes that the two businesses are not direct competitors.

a. UTC and the Employer Provide Different Services Under Colorado Law.

Under Colorado Public Utility Commission regulations, one cannot to drive a vehicle for hire as a "common carrier" unless he or she has been granted a certificate from the CPUC. *See* R. Ex. 16. The regulations themselves clearly demonstrate that taxicab carriers and shuttle van drivers are considered separately under Colorado law and do not compete for the same certificates.

Under CPUC regulations, there are five types of "common carrier": charter, limousine, sightseeing, taxicab and scheduled carriers. *See* 4 CCR 723-6, provided at R. Ex. 16, at § 6203(a)(VIII)(B) (in its application seeking authority to operate as a common carrier, a company must state "the proposed type of service (*i.e.*, charter, limousine, sightseeing, taxicab, or scheduled ...)"). Shuttle van service provided by the Employer is

considered "limousine service" under Colorado law, while taxicab service falls under its own category.

"'Limousine service' means the transportation of passengers charged at a per-person rate, and the use of the motor vehicle is not exclusive to any individual or group." *Id.* at § 6201(h). On the other hand, a "taxicab" is defined as "a passenger-carrying motor vehicle for public hire, with a maximum seating capacity of eight, operating on a call-and-demand basis, the first passenger therein having exclusive use of the motor vehicle unless such passenger agrees to multiple loading." *Id.* at §6001(uu). Further, "'Taxicab carrier' means a common carrier with common carrier certificate authorizing service by taxicab." *Id.* at § 6251(e). Indeed, the application for a certificate for a shuttle van driver requires different facts than the application for the taxicab driver. *Id.* at §6203(a)(XII)(XIII)(XIV).

For these reasons it is clear that the Regional Director's finding that the Employer and UTC "compete for a finite number of licenses issued for passenger transportation," (RD D&O p. 43) is simply wrong. Since the certificates for a shuttle van driver and a taxicab driver are different, they are not competing for the same finite number of certificates.

Further, as the taxicab drivers operate a different type of service than the shuttle van drivers with different fare structures, they are not directly competing for the same customers. The taxicab drivers are, as the CPUC regulations make clear, used by individuals seeking "exclusive use of the motor vehicle" at a per mile fare rate. The shuttle vans are a shared ride at a flat fee regardless of destination. The taxicab drivers actual competition is with other taxicabs, not the shared-ride shuttle vans.

b. The Alleged Incident at the Hyatt Hotel Does Not Demonstrate that UTC Competes with SuperShuttle.

To reach his overall conclusion that UTC and SuperShuttle are direct competitors, the Regional Director placed great reliance on an alleged "dispute between UTC and SuperShuttle Denver at the downtown Hyatt Regency convention center hotel." (RD D&O p. 43). The only evidence regarding the Hyatt hotel issue was a single e-mail admitted into the record. *See* R. Ex. 31 at 000008. There was no testimony whatsoever concerning the alleged incident that is described in the e-mail, including no testimony from either the drafter or the recipient of the e-mail. In fact, the Employer called the recipient of the e-mail, Local 7777 president Lisa Bolton, as a hostile witness, but failed to ask her even a single question about the incident. This is hardly the type of evidence upon which a Regional Director should rely to deny employees their statutory rights to seek a collective bargaining representative of their choice.

Further, the statements in this e-mail cannot form the basis for any factual findings because they are nothing more than rank hearsay. The Regional Director was considering the statements contained in the e-mail for the truth of the matters asserted. Such hearsay statements are inherently unreliable. In any event, even relying on these hearsay statements, the Regional Director's characterization of this incident is inaccurate.

The e-mail does not evidence competition between UTC and the Employer. In the October 22, 2009 message, UTC General Manager Gudeta Barasso asked Local 7777 president Lisa Bolton for help in addressing an issue at the Hyatt Convention Center hotel where the hotel's managers were allowing Yellow Cab managers into the hotel to solicit customers instead of allowing them to come out to the cab stand. R. Ex. 31 at 000008. Barasso stated that he approached Hyatt's managers but was told that Yellow Cab

managers were only present to assist SuperShuttle customers. Significantly, Barasso did not take issue with SuperShuttle getting the passengers. Instead, he focused his concern solely with the competitor Yellow Cab.

> However, we have determined on Tuesday October 20, 2009 that yellow cab supervisors are all over the hotel talking to Hyatt's front desk personnel and customers inside the hotel lobbying customers to take either super shuttle or yellow cab. The same supervisors were calling yellow cabs from street to load customers while other taxicabs are waiting on hotel's taxi stand.

Id. Thus, it is clear that Barasso's complaint was not with SuperShuttle. Had he had an objection about SuperShuttle, he would have raised it with the Hyatt's managers when he met with them. Instead, Barasso's complaint was with the fact that Yellow Cabs were permitted to pick up passengers without having to wait like other taxicabs – including those driven by UTC taxicab drivers – were required to do. It is apparent that UTC did not contend that SuperShuttle was getting an unfair advantage over the UTC taxicab drivers. This e-mail, even if the hearsay statements were accepted as true, is clearly not an example of competition between SuperShuttle's far less expensive shared-ride shuttle service and UTC taxicab drivers' more expensive taxicab service, but rather a dispute between two taxicab companies.

Since the Employer cannot meet its heavy burden to show that the taxicab drivers directly compete with the Employer, there can be no finding that the Union would have a "disabling conflict of interest." But even if the Employer could prove and the Regional Director was correct, that UTC and the Employer are direct competitors, the evidence would not support a finding of a "disabling conflict of interest".

2. Even if UTC and SuperShuttle were Direct Competitors, the Evidence Does Not Support Finding a "Disabling Conflict of Interest" that Would Interfere with the Union's Single-Minded Representation of Employees of SuperShuttle.

a. The Union Has No Ownership Interest in UTC and Derives No Pecuniary Advantage in UTC's Success.

As described above, even where businesses are direct competitors, a "disabling conflict of interest" is found only if the Employer meets its heavy burden to show either (1) the Union itself owned and operated a business that competed with or provided services to the respondent employer or (2) Union agents who have a financial stake in a competitor are involved in collective bargaining with the respondent employer. There is no evidence to support either type of case.

First, as the Regional Director acknowledged in his decision, the record does not support a finding that the Union owns and operates a business that competes with or provided services to the respondent employer.[7] (RD D&O p. 43).

The record evidence shows that the Union assists taxicab drivers who are members of the Union. Since UTC is nothing more than a conduit for the taxicab drivers, it is the taxicab driver-owners of UTC, and not UTC itself, which receives the benefits of the representation from the Union. UTC, in fact, is a non-profit cooperative. UTC "operate[s] on a service-at-cost basis for the mutual benefit of its members." R. Ex. 3, Article VII, § 7.1. After expenses for the pooled resource, the balance of any gross receipts is distributed back to the taxicab drivers who created it. R. Ex. 3, Article VII,

[7] On the UTC website it states "CWA Local 7777 member." (R. Ex. 30). As UTC counsel explained, that is a "factual inaccuracy." (Subpoena Tr. 56). Most probably it was intended to include an "s" after "member" indicating, like the union label does in printing and clothing, that the drivers are union members. In any event, by itself this statement on the website does not prove that Petitioner or even CWA Local 7777 has any ownership interest. To meet its "considerable burden" to prove the ownership interest, Respondent would need to offer evidence that clearly establish CWA Local 7777 "actually controls and operates" the UTC. *Bausch & Lomb*, 108 NLRB at 1561. No such evidence was offered.

§7.2(a)(iv) and (c). Thus, it is the individual taxicab drivers, not the UTC, who gain when the taxicab drivers get more work. Moreover, the evidence showed that the Union represents taxicab drivers who drive for other entities than UTC. Clearly such representation demonstrates the Union's ability to single-mindedly represent drivers regardless of whom they work for.

There is no evidence that the Union receives any greater revenues dependent of the success of the taxicab drivers at UTC. In fact, the evidence shows the success of the taxicab drivers is irrelevant in determining the amount of dues received by the Union from those drivers. Regardless of how successful each taxicab driver is, UTC has a defined number of certificates – 262 – and only one driver can use each certificate. Further, the Union's dues are a flat amount of $28.00 per month for each driver. Thus, dues are not tied to revenues (taxicab fares) that each driver receives. For these reasons the taxicab drivers' greater success would not cause an increase in revenues (i.e. dues) that the Union receives from the members.

The Union, in fact, has no financial incentive for SuperShuttle to fail. The number of taxicab drivers working under the UTC banner and the amount of membership dues each of these set number of taxicab drivers pays are the same whether or not SuperShuttle is successful. Therefore, contrary to the Regional Director's conclusion, the dues that the Union receives from these taxicab driver members would not impact how it represents the van drivers of SuperShuttle. Indeed, the fact is that the Union would prosper more if it organized SuperShuttle and negotiated a collective bargaining agreement as it would have more members paying membership dues. Therefore, this case does not rise to the level of cases like *Bausch & Lomb* and *St. John's Hospital and*

Health Center as those cases dealt with entities where the Union had a financial stake in a business. Here, as the Union has no financial stake in the success of UTC, there is no basis to find, as the Regional Director erroneously did here, that the Union would not have the single-minded purpose of representing the SuperShuttle van drivers in collective bargaining.

b. The Fact that One Organizer of the Local Union Has a Minor Ownership Interest in UTC Does Not Create a Disabling Conflict of Interest.

Furthermore, there is no evidence to support or suggest that the second category of cases applies – where an agent of the Union who is involved in collective bargaining with the Employer also has an ownership interest in a competitor. Here, no owner of the business works for the Petitioner Union. One driver-owner, Abdi Buni, does work as an organizer for the Local Union. But Buni is just one of 262 owners of the business and one of nine members of the UTC Board of Directors. In fact, there is not a scintilla of evidence that Buni, as an organizer for the Local Union, would be involved in collective bargaining with the Employer. Indeed, the International, not the Local Union, negotiates the contract.

c. The Union's Intervention on Behalf of UTC's Drivers Would Not Prevent it From Zealously Representing the Employer's Drivers.

In his Decision, the Regional Director bizarrely found that the Union's "intervention on behalf of one entity can result in loss of business for another entity. This can take the form of one company gaining vehicle certificates, while the other entity loses them." (RD D&O p. 46). The Union does not believe that this proves a "disabling conflict of interest" since often times unions representing employees employed by direct

competitors engage in activities such as a strike or boycott due to unsuccessful negotiations that result in loss of business for that entity and improved business for another competing entity.

In any event, the Regional Director's gambit into speculation is neither based in the evidence presented at hearing, nor the reality of common carriers under Colorado law and therefore would not support finding a "disabling conflict of interest" under any theory.

The issue of CPUC-regulated certificates also does not lead to a conclusion that CWA has a disabling conflict of interest. First, as fully described above, the certificates for the shuttle van drivers are different than the certificates for the taxicab drivers. Thus, the taxicab driver-owners of UTC cannot gain certificates when SuperShuttle loses them. Second, even if the Employer lost some or all of the certificates it received to operate the shuttle van service, there is no evidence to support the supposition that the taxicab drivers would gain such certificates. Allocation of certificates is done by the Colorado Public Utility Commission. It has the sole discretion to determine who receives such certificates. So if the Employer lost certificates and the CPUC decided to issue new certificates, there is no telling who would apply for such certificates and, more importantly, to whom the CPUC would transfer these certificates.

This factual error by the Regional Director was a primary basis for his conclusion that the Union would not have a "single-minded representational purpose" in representing the Employer's employees. (RD D&O p. 47). As the Union does not gain financially if SuperShuttle fails, there is no factual basis for the Regional Director's conclusion that the

Union would not have the sole interests of the Employer's employees in mind when it negotiated a collective bargaining agreement on behalf of these employees.

The Regional Director also found that, "Intervention by the Union on behalf of UTC could also take the form of one entity gaining a time advantage for curbside waiting at DIA, or for locations to park and wait for passengers in the downtown area, which is precisely the kind of intervention UTC was seeking from the Union in its dispute at the Hyatt." (RD D&O p. 47). Both of these findings are unsupported by the record and purely speculative.

First, there was no evidence presented that established that either entity had the ability to gain a time advantage for curbside waiting at the airport. Indeed, there was not even any evidence to show that the taxicabs and the shuttle vans waited and picked up passengers in the same area at the airport. Second, as described above, the only evidence was hearsay that showed that the dispute at the Hyatt was with another taxicab company, Yellow Cab, not the Employer.

This factual finding was a basis for the Regional Director's conclusion that such intervention could have a "significant impact on the Union's representational capacity for the SuperShuttle Denver employees." (RD D&O p. 46). As there is no evidence to support that the Union could interfere with the success of SuperShuttle, there is was basis to conclude that Union's representational capacity of the Employer's employees would be affected.

d. The Union's "Non-Traditional" Representation of Taxicab Drivers Would Not Prevent it From Zealously Representing SuperShuttle Drivers.

The Regional Director also placed great reliance on the fact that the Union, through its Local, does not have a "traditional collective bargaining" relationship with UTC. The fact that the Union, through Local 7777, does not have a collective bargaining relationship with UTC and does not process grievances on behalf of taxicab drivers against UTC is simply irrelevant to its ability to represent SuperShuttle's drivers.

First, the Union provides all kinds of other representational services that benefit taxicab drivers throughout Denver, whether they work for UTC or not. As fully described above, Local 7777 has met with parking enforcement officials, government officials and airport officials to intervene on behalf of workers. Further, it has accompanied cab drivers to court and organized protest activities to further the drivers' interests. The Union has promoted the use of union taxicab drivers similarly to how it promotes use of products from other unionized employers and has partnered legislatively with UTC much in the same way it has done so with unionized telephone-industry employers.

Thus, whether the representation of taxicab drivers is traditional or not, the fact that CWA could represent both taxicab drivers and shuttle drivers is identical to the myriad of occasions where a labor union represents competing businesses in the same industry. As the Board has noted, it "does not present such an 'innate danger' to the bargaining process that the Board could justify limiting employees' statutory rights of free choice." *CMT, Inc.*, 333 NLRB 1307, 1308 (2001). The same is true where, such as here, the Union provides representational services for other members that does not include collective bargaining and grievance processing under a collective bargaining agreement.

There is no case law to support the Regional Director's conclusion that the Union must have a traditional collective bargaining relationship with each entity to find that the Union can represent members working for different entities within the same industry and not create a conflict of interest. Indeed, this Union's relationship with these independent contractor taxicab drivers is not unique and hardly diminishes its role as a representative for these members. For example, other unions, such as the Musicians Union, have members who are independent contractors and for whom the union may not have a traditional collective bargaining relationship. *See, e.g., American Federation of Musicians of U. S. and Canada* v. *Carroll,* 391 U.S. 99 (1968). As the Supreme Court noted in *Eastex, Inc. v. NLRB*, 437 U.S. 556, 565 (1978), "labor's cause often is advanced on fronts other than collective bargaining and grievance settlement within the immediate employment context."

3. The Board's Decision in *Alanis Airport Services* Does Not Compel a Finding of a Disabling Conflict of Interest.

The Regional Director wrongly determined that the Board's decision in *Alanis Airport Services*, 316 NLRB 1233, compelled a finding of a "disabling conflict of interest." The Regional Director's reliance on that case fails for two reasons.

First and foremost, the Board in *Alanis* never found, or even suggested that the facts in that case would lead to the conclusion that the Regional Director reached here – that there was a "disabling conflict of interest." Rather, the Board found that the claim was premature and any party could raise it in the future "if there is a change in circumstances." *Id.* at 1234.

Second, even if one could interpret *Alanis* as finding that, if the alleged competitive business came to fruition there would be a "disabling conflict of interest", it

would be inapplicable. The Regional Director mistakenly found that the "analysis in *Alanis* is instructive because the facts regarding [that union's] involvement with [the potential competitor] are similar to CWA's involvement with UTC." (RD D&O p. 41). However the union's involvement with the potential competitor in *Alanis* is not similar to CWA's involvement with UTC.

Significantly, in *Alanis*, two of the fifty-five owners of the potential competitor were the president and secretary-treasurer of the union and they also made up 40% of the potential competitor's board of directors. *Id.* at 1233. In other words, *Alanis* had the potential to fit into the second category of cases described above – those where an agent of the Union who is involved in collective bargaining with the Employer also has an ownership interest in a competitor.

Here, however, there is no one in a leadership position with the Union or Local 7777 who is also an owner or director of UTC. Unlike in *Alanis*, no employee of the International Union, the collective bargaining representative that would select the negotiators and bargain the contract if the employees prevailed in an election, has any ownership interest or decision making role with UTC. It is true that Local 7777 has an organizer who is one of 262 owners of UTC and one of nine directors on UTC's board. But the evidence shows that the organizer is not involved in a leadership role, collective bargaining or representational issues for Local 7777, let alone the Petitioner-Union.

Accordingly, the Regional Director's holding that "the form of assistance provided by the Union to UTC in exchange for monthly financial remuneration is in direct conflict with the single-minded representational purpose required of a bargaining representative" is wrong as a matter of fact and of law. As explained above, the Union

does not receive monthly financial remuneration from UTC. It receives membership dues from taxicab drivers who are members of the Union. Further, its representation, through lobbying and other activities is to benefit the taxicab drivers, not UTC.

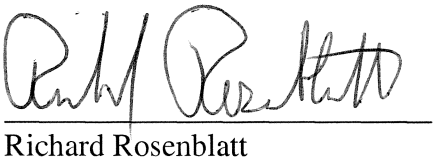
To conclude, as the Regional Director does, that the Union, if selected through an NLRB election to represent the shuttle van employees, would not have the single minded purpose in fairly representing them is not supported by the record but rather is pure hypothesis and speculation. However, "[h]ypothesis and speculation are not a sufficient foundation on which to erect a barrier against bargaining." *Western Great Lakes Pilots*, 341 NLRB at 282.

The Employer's employees made a choice to seek exclusive representation with the Union. The Employer's attempted roadblock to the employees' choice should not be allowed to stand. As the Board stated in *CMT, Inc.*, 333 NLRB at 1309, "the employees are in the best position to decide if representation by the Petitioner will serve their interests and will make that decision by casting their ballots for or against the Petitioner in the representation election."

VI. CONCLUSION

For each and all of these reasons, the Regional Director's finding that the Union has a "disabling conflict of interest" should be reversed and an election ordered among the Employer's employees.

Respectfully submitted,



May 20, 2010

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 20th day of May, 2010, I electronically filed a true and correct copy of **COMMUNICATIONS WORKERS OF AMERICA'S BRIEF ON REVIEW** with the NLRB's E-file, electronic filing system which will send notification of such filing to:

Lester A. Heltzer
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National Labor Relations Board
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Washington, D.C. 20570-0001

A true and correct copy of the foregoing and a Certificate of Service was sent via e-mail to the following parties:

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